STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CEDRIC JOHNSON,

Defendant-Appellee.

UNPUBLISHED
September 10, 2002

No. 239886
Wayne Circuit Court
LC No. 01-013859

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant was charged with possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v). Defendant filed a motion to suppress evidence of the heroin found in his pocket when he was searched in a private home (not his own) while the police were executing a search warrant for the premises. After an evidentiary hearing, the trial court concluded that there was a lack of probable cause for the search of defendant's pocket, and therefore, suppressed the evidence. Because the prosecutor had no other evidence with which to proceed, the case was dismissed. The prosecutor appeals as of right, and we now affirm.

I. Facts And Procedural History

The evidence brought forward during the evidentiary hearing and the facts found by the circuit court are straightforward and undisputed. Defendant presented no evidence during the hearing while the prosecutor presented as witnesses Detroit police officers Ceiere Campbell and Ahmed Haidar. The only exhibit admitted into evidence was the November 14, 2001 search warrant and affidavit.

According to Officer Campbell, on November 12, 2001, the police conducted a controlled purchase of narcotics from 8855 Heyden in Detroit. The informant who made the purchase provided Campbell with a description of the person who sold him the drugs. The next day, Officer Campbell monitored the house and saw a person matching the description given by the informant, who opened the front door for a number of people during the surveillance period. Officer Campbell's description of these events was set forth in the search warrant affidavit as follows:

> On November 12, 2001 affiant met with SOI #2012. The SOI was searched for drugs and money with negative results, was issued a sum of Secret Service Funds

> with which to make the purchase. The affiant observed the SOI go directly to the target locations front door, enter, stay briefly, then return directly to the affiant and turned over a quantity of suspected cocaine, and indicated that it was purchased from the above described seller at the above described place using the funds provided. The SOI was again searched for drugs and money with none found.
>
> The affiant conveyed the suspected cocaine to the Narcotics Section where a preliminary analysis proved positive. The cocaine was then placed into LSF #497947.
>
> On November 13, 2001 affiant conducted surveillance of the target location. The affiant observed at least five unknown persons arrive both on foot and in vehicles within a thirty-minute period. The affiant would observe the individuals travel to the front porch, enter, stay briefly, then leave. The affiant believes this information coupled with the above facts is consistent with ongoing narcotic activity.

Based on the testimony contained in the search warrant affidavit, a search warrant was signed on November 14, 2001 authorizing the search of 8855 Heyden, and in particular the following items:

> Also to be searched is the seller, described as a b/m/ approximately 40-45 years old, 6'0, 170lbs, medium build w/dark complexion and short black hair, referred to hereafter as seller, and to seize, tabulate and make return according to the law the following property and things; all controlled substances, all moneys, books and records used in connection with illegal narcotic trafficking, all equipment and supplies used in the manufacture, delivery, use or sale of controlled substances, all firearms used in connection with the above described activities, all evidence of ownership, occupancy, possession or control of the premises.

Both officers Campbell and Haidar participated in one form or another with the subsequent execution of the search warrant. Officer Haidar's assignment was to provide security toward the rear of the dwelling while the raid was initiated. Once the premises had been secured, Officer Haidar entered the dwelling. Officer Haidar found four adults who were already located in the living room, while Officer Campbell testified to also seeing "some children" in the house. Officer Haidar testified that he decided to conduct pat down searches for weapons on the adults for safety purposes and for the purpose of locating evidence of contraband.[1] With respect to defendant, Officer Haidar conducted a pat down search and, while doing so, grabbed defendant's right front pocket and rubbed it together, which produced the sound of a plastic baggie rubbing together. As he removed the baggie from defendant's pocket, another item fell out. The other

[1] The testimony established that the pat down search conducted by Officer Haidar took place after the officers had already conducted a sweep of the house to locate other potential inhabitants.

item was another baggie containing loose marijuana. Officer Haidar's testimony as to this event was as follows:

(By Mr. Bresnehan)

Q. When you were conducting your search on the outside part of the clothing, correct?

A. Yes.

Q. You indicated that. You indicated you felt something, correct?

A. Correct.

Q. And based on your experience as a police officer you felt it was packaging. What made you conclude that?

A. When I removed it from his pocket.

Q. Okay, what made you initially suspect it could have been contraband or any type of evidence?

A. Because it was a sandwich baggie, and from my past experience ninety percent of the time narcotics would be stored in a sandwich baggie.

Q. Okay, was there something about the material that made you believe it was a baggie when you felt it?

A. It was the plastic. When I rubbed it together I felt, I could hear the plastic rubbing.

Q. Okay, and at this time you felt that you –it was a baggie and you took it out of the defendant's pocket, correct?

A. Yes.

Q. And what did you then do with it?

A. I took the baggie out of his pocket and another item fell out of his pocket, along with the baggie that I obtained in my hand had loose marijuana in it.

Q. Okay, and that fell out as you were pulling out the first baggie?

A. Yes.

The undisputed evidence also established that there were no other narcotics found during the search of the home and neither defendant nor any of the other persons present in the home ever made any motion, gesture, or any other type of act that caused Officer Haidar to believe that

defendant was dangerous or associated with any criminal activity in the house. Defendant was subsequently arrested.

After a suppression hearing, the trial court granted defendant's motion, holding that although the officer had the authority to conduct a pat down search of defendant, the officer's pat down of defendant did not provide him with probable cause to believe defendant had contraband in his pocket. See *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). The prosecutor now concedes on appeal that the evidence was not properly seized under the plain feel exception to the warrant requirement, and thus does not challenge the trial court's decision in that regard.

II. Analysis

The prosecutor, however, now defends the search of defendant on the ground that this Court should adopt a bright line rule under which the scope of the search warrant for narcotics in a private residence would allow the search of anyone found on the premises.[2] Because this argument was not properly presented to nor decided by the trial court, the issue is not preserved. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). This Court's review of an unpreserved issue is limited to determining whether the prosecutor demonstrated a plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). This Court reviews constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

A. *People v Hawkins; People v Burbank*

In support of his assertion that the scope of a search warrant for narcotics in a private residence should automatically justify the search of all persons found on the premises, without regard to probable cause or reasonableness requirements, the prosecutor argues that the United States Supreme Court decision in *Wyoming v Houghton*, 526 US 295; 119 S Ct 1297; 143 L Ed 2d 408 (1999), changed the landscape of search and seizure law. The prosecutor asserts that *Houghton* extended the scope of a search warrant to the pockets of persons found on the premises because, as the prosecutor contends, when drugs are concerned, persons' pockets constitute "any place where the items sought might reasonably be expected to be found." The prosecutor argues that, in light of *Houghton*, this Court should reexamine its decisions in *People v Hawkins*, 163 Mich App 196; 413 NW2d 704 (1987), and *People v Burbank*, 137 Mich App 266; 358 NW2d 348 (1984).

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). Absent a compelling reason to impose

[2] During closing arguments in the trial court, the prosecutor did make minimal reference to the argument that searching the individuals found in the house was permissible pursuant to the search warrant. However, the trial court did not decide that issue, most likely because the main thrust of the prosecutor's argument was that the plain feel exception authorized the search and seizure. The lower court record does not contain a written response to defendant's motion, so we are unable to discern what, if anything, the prosecutor argued in writing to the trial court.

a different interpretation, the Michigan Constitution is construed to provide the same protection as that secured by the Fourth Amendment. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999). Generally, a search or seizure conducted without a warrant is unreasonable unless there exists both probable cause and a circumstance establishing an exception to the warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been or is being committed and that the evidence sought will be found in a stated place. *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). Whether probable cause exists depends on the information known to the officers at the time of the search. *Id*. at 750.

In *Burbank, supra,* the defendant was found, along with several other adults and children, in a home that was being searched. All were placed with their hands up against a wall. One of the officers on the scene observed "bulges" in the defendant's brassiere. Although the defendant was not one of the persons listed in the search warrant to be searched, the officer took the defendant into another room to be searched. Three vials of amphetamine were found. The trial court suppressed the evidence, and this Court affirmed, holding that the officer did not have probable cause to search the defendant when the defendant was not a resident of the house, and the police officer did not have any facts upon which to assert probable cause to search her brassiere. *Burbank, supra* at 269-270. The Court rejected the prosecutor's argument that the defendant was properly searched because the defendant was found in a home in which narcotics were found on other persons. *Id.* at 270.

The basis for the *Burbank* Court's holding was *Ybarra v Illinois*, 444 US 85; 100 S Ct 338; 62 L Ed 2d 238 (1979). In *Ybarra*, a search warrant was issued authorizing the search of the Aurora Tap Tavern and its bartender for any evidence pertaining to the possession of a controlled substance. *Ybarra, supra* at 88. That same day police officers executed the search warrant. One officer conducted pat down searches of the nine to thirteen customers present, including the defendant, as a "cursory search for weapons." *Id.* When patting down the defendant, the officer felt a cigarette pack that he thought contained "objects." *Id.* After patting down the remaining customers, the officer returned to the defendant, removed the cigarette pack, and found in it six tin foil packets of heroin. *Id.* at 89.

The defendant filed a motion to suppress, which was denied by the trial court. The Illinois Court of Appeals affirmed, and the Illinois Supreme Court denied leave to appeal. The United States Supreme Court reversed, holding that the defendant's Fourth Amendment right against unreasonable searches was violated. *Id.* at 96.

The Court's holding was based on two principles. First, the Court held that probable cause is not provided by the singular fact that the person is located in a dwelling in which there is judicially determined probable cause to believe that illegal activity is taking place:

> It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, *a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v New York,* 392 US 40, 62-63, 88 S Ct 1889, 1902, 20 L Ed 2d 917. Where the standard is probable cause, a search or seizure *of a person* must be supported by

> probable cause particularized with respect to that *person*. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" *of persons*, not places. [*Id.* at 91 (footnote omitted; emphasis added).]

The *Ybarra* Court also held that the search of the defendant could not be justified under *Terry* because the *Terry* exception "does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on the premises where an authorized narcotics search is taking place." *Id.* at 94.

Returning to our State court decisions, several years following *Burbank*, we decided *Hawkins, supra.* In that case the defendant was given a pat down search when he was found in a house during the execution of a search warrant. Upon performing a *Terry* pat down search, the police found two vials of Percodon on the defendant. The defendant was arrested, but the case was ultimately dismissed when the trial court suppressed evidence of the Percodon. *Hawkins, supra* at 197. This Court affirmed the trial court, holding that under *Ybarra* and *Burbank*, the officers could not search the defendant on the sole basis that he was in a house that was the subject of a valid warrant:

> We disagree with the prosecutor's argument that the search of defendant's person was authorized by the warrant. In *Ybarra v Illinois*, 444 US 85, 91; 100 S Ct 338; 62 L Ed 2d 238 (1979), the Supreme Court noted that persons have a constitutional right guaranteed by the Fourth and Fourteenth Amendments to the reasonable expectation of personal privacy. When a search warrant is executed and persons not named in the warrant are searched on the basis that their presence on the premises made them "containers of the evidence," that constitutional right is eroded. *Ybarra, supra; People v Arteberry*, 154 Mich App 1, 4; 397 NW2d 198 (1986), lv gtd 428 Mich 857 (1987); *People v Burbank*, 137 Mich App 266; 358 NW2d 348 (1984), lv den 419 Mich 917 (1984), cert den 469 US 1190, 105 S Ct 962; 83 L Ed 2d 967 (1985).
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> In the instant case, defendant did not live in the house that the police were searching, nor did the police have probable cause to search defendant. Because it was not apparent that defendant possessed illegal contraband, the police could not arrest defendant or extend the warrant to search him. *People v Secrest*, 413 Mich 521, 528; 321 NW2d 368 (1982); *Burbank, supra*. [*Id.* at 197-198.]

B. *Wyoming v Houghton*

Houghton is a case that dealt with the automobile exception to a warrantless search of the contents of an automobile. The issue in that case was whether "police officers violate the Fourth Amendment when they search a passenger's *personal belongings* inside an automobile that they have probable cause to believe contains contraband." *Houghton, supra* at 297 (emphasis added). That case did not involve the search of the purse's owner or the search of a person's pockets. The difference between searching a person, as opposed to a container, is significant. Indeed, the *Houghton* Court repeatedly emphasized the constitutional distinction between the two searches.

In holding that all containers found within an automobile are the proper subject of a search when there is probable cause to believe that the automobile itself contains contraband, the *Houghton* Court emphasized that it's holding was entirely consistent with *Ybarra* and the earlier decision of *United States v Di Re*, 332 US 581; 68 S Ct 222; 92 L Ed 2d 210 (1948). The Court, speaking through Justice Scalia, noted that *Ybarra* and *Di Re* "turned on the unique, significantly heightened protection afforded against searches of one's person," *Houghton, supra* at 303, and, citing *Terry, supra* at 24-25, the Court explained why the search of a person, as opposed to an object, is granted this "heightened protection:" "'Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.'" *Houghton, supra*. Thus, because "[s]uch traumatic consequences are not to be expected when police examine an item of personal property found in a car," the Court held that the Wyoming Supreme Court had erred in relying upon *Di Re* and *Ybarra* because those cases involved searches of persons, rather than containers as in *Houghton. Id.* at 303 and n 1. See also *id.* at 308 (Breyer, J., concurring). Hence, in reviewing *Houghton*, it is abundantly clear that the Court specifically distinguished between the law governing searches of persons as dealt with in *Di Re* and *Ybarra*, and the search of objects belonging to persons as addressed in *Houghton.*

In light of the foregoing principles, it is apparent that the holdings of this Court in *Burbank* and *Hawkins* remain good law after *Houghton.* As discussed, *Houghton* did not deal with the search of a person, but dealt with the substantially different issue of searching an object of personal property not found on the person, but in a car. Hence, the prosecutor has failed to convince us that *Houghton* has at all changed the legal landscape with respect to the search of *persons* under the Fourteenth Amendment.[3]

We also emphasize what this case is *not* about. Neither the facts in this case nor the arguments presented raise the line of cases which distinguish *Ybarra* on the basis that the occupant searched was determined not to be a "mere visitor" in a private home that was the subject of a search warrant. Those cases, which emanate from both the state and federal courts, have held on a variety of grounds that occupants who are found, for example, in a house containing narcotics in the open for all to view, are not in a position similar to a random customer in a public tavern. See, e.g., *United States v Gray*, 814 F2d 49, 51-52 (CA l, 1987) (upholding a search of the defendant's jacket, which he was not wearing, even though he was a visitor not named in the search warrant because it was 3:30 a.m. and a drug deal had just "gone down"); *United States v Holder*, 990 F2d 1327, 1329 (CA DC, 1993) (the defendant's proximity to large amounts of narcotics on open display gave probable cause to search the defendant); *United States v Savides*, 664 F Supp 1544, 1550-1552 (ND Ill, 1987) (the defendant's presence in the home with large quantities of narcotics and weapons in plain view granted police probable cause to search the defendant, even though he was a visitor in a private home); *State v Andrews*,

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[3] We point out that other than *Houghton*, the prosecution has not provided this Court with any authority in support of its position. We would expect that in asking this Court to reverse two of our precedents, the prosecution could offer at least one case that holds that all occupants in a private dwelling are subject to a search based on the existence of a warrant to search the premises for narcotics and devices used with same.

201 Wis 2d 383; 549 NW2d 210 (1996) (distinguishing between searches of a person and the search of a visitor's "belongings"); *State v Leiper*, 145 NH 233; 761 A2d 458 (2000).[4]

The dissenting opinion overstates our holding in this case. We, in no fashion, hold that there is an "absolute bar" to the search of persons located on private premises subject to a search warrant. Rather, we simply hold that (1) *absent probable cause* to search individuals not named in the search warrant and who do not own or reside in the premises, they cannot be searched without offending the Fourth Amendment (assuming, also, of course, that no other exception to a warrantless search exists), and (2) *Houghton* does not stand for the proposition that all *persons* found within a dwelling can be searched as potential containers of evidence (again, absent probable cause to do so). These are hardly remarkable conclusions given that the *Houghton* Court specifically distinguished *Ybarra* and *Di Re* from the case before it, and the failure of the prosecution to cite a single case which is contrary to our holding today. Finally, although we too find Justice Rehnquist's dissent reasonable and well-founded, "[a] dissenting opinion obviously does not constitute binding precedent." *US v Jackson*, 240 F3d 1245, 1249 (CA 10, 2001). Our obligation is to follow the Supreme Court's binding opinions interpreting the Fourth Amendment, and as a lower court, we cannot alter these precedent. That task is to be taken, if at all, by the Supreme Court. *Rodriquez De Quijas v Shearson/American Express Inc*, 490 US 477, 484; 109 S Ct 1917, 1921; 104 L Ed 2d 526 (1989).

Accordingly, because the prosecution concedes the propriety of the trial court's ruling as to the invalidity of the search under *Terry*, and no other probable cause has been suggested to exist that would have warranted the search of defendant, we affirm the trial court's order.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald

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[4] For a discussion of these cases and the differing principles espoused with respect to the search of a visitor's personal belongings when located in a private home subject to a search warrant, see *Propriety of Search of Nonoccupant Visitor's Belongings Pursuant To Warrant Issued For Another's Premises*, 51 ALR 5th 375 (1997) and *People, Places and Fourth Amendment Protection: The Application of Ybarra v Illinois To Searches of People Present During The Execution Of Search Warrants On Private Premises*, 25 Loy U Chi LJ 243 (1994).